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No. 602

In the

Supreme Court of the United States

OCTOBER TERM, 1968.

MR. CHARLES R. BARR, and MR. THOMAS W. NOVOTNY, individually, and representing the members of the unincorporated association of Illinois voters, more commonly known as Operation Eagle Eye, and MR. DAVID R. REED, individually, on behalf of themselves and all other Illinois voters similarly situated,

Petitioners,

vs.

RUTHIE MAE CHATMAN, BETTY JEAN BUSSIE, RUBY ROBERTS, MATTIE M. TAYLOR AND LILLIE RUBEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on July 5, 1967.

OPINIONS BELOW

The memorandum opinion of the District Court for the Northern District of Illinois (A. 18)* is not reported but is printed in the Appendix hereto, *infra*, P. 1a. The opinion of the Court of Appeals for the Seventh Circuit, printed in the Appendix hereto, *infra*, P. 2a, has not been officially reported yet.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 5, 1968. A petition for rehearing was not filed. Jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254(1).

QUESTION PRESENTED

Does a citizen, whose vote for a United States Senator has been arbitrarily impaired through the intentional stuffing of a ballot box by officially appointed judges of election, have a cause of action for a deprivation of his rights, privileges and immunities secured by the United States Constitution and laws pursuant to Title 42 of the United States Code, Section 1983?

STATUTES INVOLVED

Title 42 U.S.C.A. §1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdic-

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* All such record citations are to the Appendix to Brief For Plaintiff-Appellant filed with the Court of Appeals for the Seventh Circuit.

tion thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 18 U.S.C.A. §241. Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

On November 8, 1966 an election was held in the State of Illinois to determine who should be one of the two representatives of the citizens of that state in the United States Senate (such election hereinafter referred to as the "Election"). During the Election, the Respondents were the officially appointed judges of election in the 47th Precinct of the 24th Ward in the City of Chicago, State of Illinois (hereinafter referred to as the "Precinct"). As judges of election, the respondents were charged with the duty of conducting an impartial election and were

clothed with the authority of the Illinois Election Laws. (A. 4)[1]

At the close of the polls, the Respondents, without actually counting the ballots which had been cast, arbitrarily determined that 300 votes had been cast for United States Senatorial Candidate Paul H. Douglas and that 3 votes had been cast for United States Senatorial Candidate Charles H. Percy. The Respondents, as judges of election, also arbitrarily determined that each and every Democrat candidate seeking election to office during the Election had received 300 votes in the Precinct and that each and every Republican candidate seeking such election had received 3 votes. (A. 5)

Actually, only 199 citizens had presented themselves to the Respondents to vote at the Election. (A, 4-5)

Prior to the time that the results of the Election were reported to the Chicago Board of Election Commissioners, as the official receiving agency, witnesses present at the Precinct challenged the improper vote count of the Respondents and requested a proper count of the ballots. This request was ignored by the Respondents and the arbitrary count was verified by the Respondents, acting as the only duly appointed election judges, to be proper. This arbitrary count was delivered to the Chicago Board of Election Commissioners and was relied upon by them as the official count from the Precinct. (A. 5).

The election results from the Precinct represented 104 votes in excess of the number of people who presented themselves to vote in the Precinct, which excess changed

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[1] All record references are to the documents filed in the United States Court of Appeals for the Seventh Circuit. "A" refers to petitioner's Appendix filed in that court.

the weight and value of all votes cast in the Election by every Illinois voter (A. 5).

The Federal Government, acting as a representative of the people, has failed to take any criminal action in connection with the allegations of the complaint. (A. 11, 12).

The complaint, brought by three plaintiffs, who do not live within the Precinct, as a class action on behalf of themselves and all other Illinois voters similarly situated,[2] asked for nominal and punitive damages in the total aggregate amount of $5,734,086, and injunctive relief for the damage caused by the defendants while acting under color of state law as the duly appointed election judges in the Precinct.

The action was based upon Title 42, United States Code, Section 1983. Jurisdiction was claimed pursuant to Title 28, United States Code, Section 1343(4).

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[2] A subsidiary issue of this case is whether the action was an appropriate class action. However, since the controlling issue is whether there is a cause of action, the question involving the validity of the class action is not presented in this petition. Further, since the United States Circuit Court of Appeals for the Seventh Circuit decided the basic issue negatively, they did not consider the question involving the class action.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS DECIDED THE FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The instant case is an attempt to protect the constitutional right to a free and honest election. It is not an election contest, nor is it a case asking for compensatory damages. Rather, it is an attempt to establish that individual citizens may protect their constitutional right to an honest election by gaining nominal and punitive damages and injunctive relief from election officials who intentionally disregard the free election system.

The facts are clear and simple. The Respondents, acting under color of state law as the duly appointed election officials, intentionally stuffed a ballot box which thereby injured the weight and value of all the votes, including Petitioners, cast in the federal election held in 1966. Unfortunately, the Court of Appeals found that the Petitioners did not have a cause of action for the destruction of their votes. This finding is in direct conflict with numerous Supreme Court decisions and, therefore, certiorari should be granted by the Court.

The Supreme Court has continually protected the weight and value of each vote cast from both sophisticated and crude attempts to alter the effect of a free and honest election. The Court has held the right to vote cannot be denied outright, *Gwinn* v. *U. S.*, 238 U.S. 347, or destroyed by alteration of ballots, *U. S.* v. *Classic*, 313 U.S. 299, or by racially based gerrymandering, *Gomillion* v. *Lightfoot*, 364 U.S. 339, or by failing to redistrict an

area in proportion to population changes, *Reynolds* v. *Sims,* 377 U.S. 533; *Westbury* v. *Sanders,* 376 U.S. 1, or, as in the instant case, by the inclusion of falsified ballots in election returns (which is more commonly known as the stuffing of a ballot box). *U. S.* v. *Saylor,* 322 U.S. 385; *Ex parte Siebold,* 100 U.S. 371.

The holding in each one of the above cited cases conflicts with the decision of the Court of Appeals. Although some of the cases are criminal actions pursuant to Title 18, §241 of the United States Code (hereinafter "Section 241"), their clear import is that a free and honest election is a fundamental civil right which receives the protection of federal law, without limitation. The authority of the criminal actions for election fraud pursuant to Section 241 for actions filed under Title 42, Section 1983 of the United States Code (hereinafter referred to as "Section 1983") is further reinforced by the well recognized doctrine of construction referred to as "pari materia", which has been used by the Supreme Court in each of the reappointment cases. See *Reynolds* v. *Sims,* 377 U.S. 533; *Westberry* v. *Sanders,* 376 U.S. 1.

Additionally, the Court of Appeals totally disregards the stated purpose of Section 1983, which is the basis of this action. One of the purposes of Section 1983 was to afford a federal right in Federal Courts when, by reason of prejudice, passion, neglect, intolerance, or otherwise, the laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the United States Constitution might be denied. *Monroe* v. *Pape,* 365 U.S. 167. In the case at bar, the criminal authorities have refused to act (A. 11-12). Unless this action is allowed, the crime alleged in the complaint will be free from prosecution and free

from effective redress. This is exactly the situation for which Section 1983 was adopted. See *Monroe* v. *Pape*, 365 U.S. 167, 174-180 Thus, the decision of the Court of Appeals is in conflict with the purpose of Section 1983 and with the decisions of the Supreme Court.

The conflict with decisions of the Supreme Court is probably most pointedly shown by a review of the reasoning in *Baker* v. *Carr*, 369 U.S. 186. This case involved an allegation that the value of the plaintiff's votes had been destroyed by improper boundaries of voting districts. It was a civil case brought pursuant to Section 1983. The lower courts denied the plaintiffs had a cause of action on the grounds that the plaintiffs were merely asserting a general right. The Supreme Court, using construction principles and language which is applicable to the instant case, reversed with the following reasoning (*Baker* v. *Carr*, 369 U.S. 186 at 208):

> "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, *cf.*, *United States* v. *Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf. United States* v. *Mosley*, 238 U.S. 383, or by a stuffing of the ballot box, *cf. Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.
>
> "It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' *Coleman* v. *Miller*, 307 U.S., at 438, not

merely a claim of 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' *Fairchild* v. *Hughes,* 258 U.S. 126, 129; compare *Leser* v. *Garnett,* 258 U.S. 130. They are entitled to a hearing and to the District Court's decision on their claims. 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.' *Marbury* v. *Madison,* 1 Cranch 137, 163."

To uphold the decision of the Court of Appeals will create a discriminatory situation in conflict with the above cited cases. On the one hand, voters may achieve, through a class action, the reapportionment of the political districts of their State on the grounds that their individual right to an undiluted and equal vote is indirectly violated by the State determined districts. While, if the instant case stands, the same voters will be prevented from protecting their votes from direct dilution caused by election fraud. This situation is not consistent with the Constitutional guarantees or with previous decisions of the Supreme Court, and, therefore, certiorari by this Court is requested.

2. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THE COURT.

No constitutional right is more protected than the right to a free and honest election. The reason for this protection is obvious: if honest elections are not protected and required, then the basis of our democratic form of government is destroyed. *Reynolds* v. *Sims,* 377 U.S. 533. However, the question of whether a citizen may protect this fundamental right from destruction by election

officials pursuant to Section 1983 has not been directly settled by the Court. In fact, only one other court besides the Court of Appeals has considered the issue and that court determined that "Stuffing of ballot boxes or the fraudulent registration of unqualified voters would amount to a violation of both the civil and criminal Civil Rights Acts." *Munzo* v. *Amador* (D.C. Texas, 1964), 230 F.Supp. 591 at 592, dismissed as moot, 340 F.2d 590.

It is difficult to imagine a more fundamentally important question of federal law that has not, but should be, settled by the Court. The importance of this question is clearly shown by the practical results if the decision of the Court of Appeals is allowed to stand: Election officials who stuff a ballot in a federal election are left free, even though guilty, to continue with their destruction of the election process when governmental authorities fail to act.[3]

The Court should settle the question of whether a private citizen may gain relief, if only nominal in character, for the violation of his constitutional right to a free and honest election.

CONCLUSION

The most important and fundamental question of federal law presented by this case, is the extent to which a private citizen may exert federal laws to protect his

[3] Although not contained in the record, it should be noted that three of the five respondents are still the duly appointed judges of election in the 47th Precinct of the 24th Ward and are to serve in that capacity during the Presidential election to be held November 5, 1968.

constitutional right to a free and honest election. Although it is a question which has not been directly decided by the United States Supreme Court in the context of a civil action, numerous Supreme Court decisions have clearly indicated that the judicial protection of the right to vote and to have one's vote receive full weight is one of the most important duties of the federal laws. The instant case, therefore, not only presents an extremely important question of federal law which has not been, but should be settled by the Court, but also presents an opinion of a Court of Appeals which has decided a fundamentally important federal question in a way which conflicts with applicable decisions of the Court in the closely related areas of criminal cases involving election fraud and of reapportionment of political districts.

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX

Memorandum Opinion of United States District Court for the Northern District of Illinois, Eastern Division

Name of Presiding Judge, Honorable Bernard M. Decker

Cause No. 67 C 506 Date Sept. 7, 1967.

Title of Cause—Charles R. Barr, et al. v. Ruthie Mae Chatman, et al.

The Court, having considered the pleadings and the briefs filed herein and having heard argument of counsel, Finds that this cause is an improper class action under F.R.C.P. 23 and that the complaint herein fails to state a claim upon which relief can be granted. It Is Therefore Ordered that the above cause be, and hereby is, dismissed.

IN THE

UNITER STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 16558 SEPTEMBER TERM, 1967 APRIL SESSION, 1968

CHARLES R. BARR, and THOMAS W. NOVOTNY, individually, and representing the members of the unincorporated association of Illinois voters, more commonly known as Operation Eagle Eye, and DAVID R. REED, individually, on behalf of themselves and all other Illinois voters similarly situated,

Plaintiffs-Appellants,

v.

RUTHIE MAE CHATMAN, BETTY JEAN BUSSIE, RUBY ROBERTS, MATTIE M. TAYLOR and LILLIE RUBEN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JULY 5, 1968

Before KILEY, SWYGERT, and FAIRCHILD, *Circuit Judges.*

SWYGERT, *Circuit Judge.* Charles R. Barr, Thomas W. Novotny,[1] and David R. Reed instituted a class action

[1] These two plaintiffs sued individually and as representatives of the members of an unincorporated association of Illinois voters known as "Operation Eagle Eye."

pursuant to FED. R. CIV. P. 23 on behalf of "all Illinois residents who voted for the election of a United States Senator [on] November 8, 1966." The complaint alleged that the defendants, Ruthie Mae Chatman, Betty Jean Bussie, Ruby Roberts, Mattie M. Taylor, and Lillie Ruben,[2] in violation of 42 U.S.C. § 1983, engaged in an "intentional miscount of the ballots cast . . . in the 47th Precinct of the 24th Ward of the City of Chicago, which misconduct necessarily distorted the outcome of the election by changing the weight of each vote cast on November 8, 1966."[3]

Four-fold relief was requested by the plaintiffs. First, they sought a permanent injunction restraining the defendants from ever holding a public office or engaging in a public occupation, "whether it be as an employee or representative of any Federal, State or Local governmental authority or body." Second, they sought "nominal damage" in the amount of $3,822,724, representing one dollar for each Illinois resident who voted in the election. Third, they sought punitive damages in the amount of $1,911,362. Fourth, they sought that all damages be paid "to the State of Illinois to be used by the State for all of the people of the State of Illinois." After the defendants filed their answer, the district court dismissed the case on the grounds that it was an improper class action[4] and that the complaint failed to state a claim on which relief could be granted.

We agree that the district court properly dismissed the plaintiffs' complaint. Although judicial protection of

[2] The defendants were judges of election in the 47th Precinct, 24th Ward in the City of Chicago, ILL. STAT. ANN. §§ 46-14-1, 14-2.

[3] Specifically, the complaint alleges that four poll watchers physically counted 199 voters who presented themselves at the precinct polling place. The results from that precinct, however, showed that 300 votes had been cast for every Democratic candidate on the ballot and 3 votes had been cast for every Republican candidate on the ballot. (If the alleged misconduct occurred, it increased the vote for the losing candidate for United States senator, and thus did not affect the outcome.) A request by the poll watchers for a proper count was ignored and the above results were certified to the Board of Election Commissioners.

[4] Prior to the district court's order of dismissal, the class action issue was briefed and argued by the parties.

the right to vote, against debasement or dilution, is essential to a representative democracy, a complaint brought under 42 U.S.C. § 1983, which alleges any voting irregularity, however slight, does not thereby automatically state a claim for relief. The plaintiffs' complaint does not allege, for example, that any voters were barred from a polling place nor that any votes cast were not counted. Instead, the plaintiffs contend that there was an alleged counting irregularity in one precinct in the entire state.

We do not believe that this alleged dilution of the right to vote, if it be a dilution at all, sets forth an injury cognizable under section 1983. Our statement in a recent case, in which we sustained the dismissal of a complaint brought under this section, alleging election irregularities, is pertinent:

> § 1983 is designed for the redress, through federal court action, of a party who is, or a class of persons who are, injured by subjection to a deprivation of a constitutional right, . . . not for the enforcement of abstract rights nor for redress for conduct, which although it constitutes a public wrong . . . the only impact resulting therefrom is that which the individual who seeks redress shares in common with all members of the public, without specific individual injury to himself. *Manion* v. *Holzman,* 379 F.2d 843, 845 (7th Cir. 1967).

What the plaintiffs are here attempting is to convert activities on the part of election judges which may have amounted to a possible criminal offense into an alleged deprivation of the rights of over three million Illinois residents who voted in the November 1966 senatorial election.

Several considerations lead us to conclude that this attempt was improper. First, the alleged misconduct had no effect on the results of the election. Second, the election was concluded long ago, and the victor in that election has taken his rightful place in the United States Senate. Third, there is no allegation that any of the defendants

are now serving or are likely in the future to serve as election judges. Fourth, none of the voters in the precinct in question, who would have been much more directly affected by any counting irregularities, sought either to join in this action or to institute an action of their own. Fifth, and most significantly, the plaintiffs pray that any recovery which they might obtain be paid to the State of Illinois for the use of the people of Illinois. This prayer serves to undermine any claim that the plaintiffs, either individually or as a group, sustained any injury to themselves.[5]

The judgment of the district court is affirmed.

[5] 42 U.S.C. § 1983 provides that liability must run "to the party injured." The plaintiffs' complaint, therefore, seeks relief which is beyond the scope of the statute.